

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

MARK BILBREY, individually and as)
representative of a class of all those similarly)
situated,)
)
Plaintiff/Appellee,) Appeal No. IN-102973
)
v.)
)
CINGULAR WIRELESS LLC,)
)
Defendant/Appellant.)
)
)
)
)
)

APPELLANT'S REPLY BRIEF

Appeal from The District Court of Canadian County, State of Oklahoma
Case No. CJ-2001-68
The Honorable Edward C. Cunningham, District Judge
Class action alleging cellular overcharges—Arbitrability

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Plaintiff Mark Bilbrey does not deny that he agreed to arbitrate his disputes with Cingular on an individual basis. He nevertheless raises a hodgepodge of arguments designed to support his lawyers' quest to pursue a nationwide class-action lawsuit. All of the arguments should be rejected: they are premised on an outdated hostility to arbitration that Oklahoma and federal law condemn.

Bilbrey's defense of the district court's order boils down to a contention that this Court should create a novel principle of Oklahoma law that invalidates class-arbitration waivers—breaking with the vast majority of other courts to have considered the issue—based on the public-policy notion that class-action lawsuits are a better means of resolving disputes than individual arbitration. That analysis is misguided as a matter of Oklahoma law: in light of the consumer-friendly features of Cingular's arbitration provision, which allows customers to arbitrate for free, the class-arbitration waiver cannot be said to be oppressively one-sided.

Moreover, Congress long ago resolved that policy question by enacting the Federal Arbitration Act to encourage and foster the use of arbitration to resolve all types of disputes, including consumer disputes. The U.S. Supreme Court has recognized “that Congress, when enacting this law, had the needs of consumers, as well as others, in mind. * * * Indeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (citing S. REP. NO. 68-536 (1924)). Remarkably, Bilbrey has entirely ignored the second issue presented in this appeal: whether the FAA would preempt a rule of Oklahoma law declaring class-arbitration waivers to be unenforceable. *See* Petition in Error, Ex. C. Indeed, Bilbrey's brief does not even mention the FAA a single

time. That is because he has no argument: he cannot deny that the district court’s reading of Oklahoma law, which conditions the enforcement of an arbitration provision on the availability of class arbitration, will, if upheld, have the predictable consequence that businesses will abandon consumer arbitration altogether. Virtually no company can or will risk facing a potentially massive class-wide arbitral judgment that is subject to a standard of review that is “among the narrowest known to law.” *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005) (citations and quotation marks omitted). And it is hard to imagine a result more inconsistent with the purposes of the FAA than the wholesale elimination of arbitration as a dispute-resolution mechanism in this State.

Bilbrey attacks a number of other features of his May 2001 arbitration provision, but all of those challenges have been mooted by the revised arbitration provision Cingular mailed to all of its customers, including Bilbrey, in July 2003. But even if the superseded arbitration provision applied here, Bilbrey’s attacks on it miss the mark.

Bilbrey’s remaining arguments—that Cingular waived its right to compel arbitration and that his dispute is outside the scope of his arbitration agreement—are also meritless; once again, Bilbrey gives short shrift to the principle that, under the FAA, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver” (*Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

ARGUMENT

I. THE CLASS-ARBITRATION WAIVER IN BILBREY’S ARBITRATION AGREEMENT IS FULLY ENFORCEABLE.

A. The Class-Arbitration Waiver In Cingular’s Arbitration Provision Is Not Unconscionable Under Oklahoma Law.

Bilbrey urges this Court to create a novel rule of Oklahoma law that would render all

class-arbitration waivers unconscionable. Yet he cannot satisfy the “basic test of unconscionability” under Oklahoma law, which will decline to enforce a contractual provision only when it is “*so one-sided as to oppress* or unfairly surprise one of the parties.” *Barnes v. Helfenbein*, 1976 OK 33, 548 P.2d 1014, 1020 (emphasis added).

Bilbrey cites *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) for the proposition that “most courts which have considered this issue” have held that prohibitions against class-wide arbitration are unconscionable. Answer Br. 23 (citing *Ting*, 319 F.3d at 1150). Yet that statement of the law—doubtful even then, and now over three years old—is belied by the overwhelming number of cases upholding class-arbitration waivers. See Br. in Chief 9-10 & n.5; Alan S. Kaplinsky and Mark J. Levin, *Consensus or Conflict? Most (But Not All) Courts Enforce Express Class Action Waivers in Consumer Arbitration Agreements*, 60 BUS. LAWYER 775 (2005).

Chief among them is *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004), in which the U.S. Court of Appeals for the Fifth Circuit upheld a version of Cingular’s arbitration provision that is functionally identical to the now-superseded provision in Bilbrey’s May 2001 Wireless Service Agreement (WSA). As the Fifth Circuit explained, “the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration’s ability to offer ‘simplicity, informality, and expedition,’ * * * characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims.” 379 F.3d at 174 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991)). And the *Iberia* court also noted with approval that Cingular’s arbitration provision authorizes customers to sue in small claims court as an alternative to arbitration.

Id. at 175 n.19.¹ A number of other courts have rejected unconscionability attacks on the class waiver in Cingular’s revised arbitration provision after concluding that customers can effectively vindicate small claims through individual arbitration under that provision. *See Blitz v. AT&T Wireless Servs., Inc.*, No. 054-00281 (Mo. Cir. Ct. Nov. 28, 2005); *Scott v. Cingular Wireless LLC*, No. 04-2-04205-4KNT (Wash. Super. Ct. Sept. 10, 2004), review denied, No. 55028-4 I (Wash. Ct. App. June 21, 2005), review granted, No. 77406-4 (Wash. Nov. 29, 2005); *Franczyk v. Cingular Wireless LLC*, No. 03 CH 14203 (Ill. Cir. Ct. June 13, 2005).

Bilbrey acknowledges *Iberia* (Answer Br. 15 n.7), but offers no reason why this Court should part company with it. Nor does he even mention, much less address, *Edwards v. Blockbuster, Inc.*, 400 F. Supp.2d 1305 (E.D. Okla. 2005), in which the federal district court for the Eastern District of Oklahoma recently relied upon *Iberia* (among other cases) in upholding a class-arbitration waiver in Blockbuster’s video rental agreement—creating a direct conflict with the district court’s ruling in this case.

Instead, Bilbrey invokes the minority of cases that have struck down class-arbitration waivers. He places particularly heavy reliance on *Kinkel v. Cingular Wireless LLC*, 828 N.E.2d 812 (Ill. App. Ct. 2005), in which an Illinois appellate court held that Cingular’s now-superseded arbitration provision is unconscionable. We contend that *Kinkel*, which is in direct conflict with another Illinois appellate court that has upheld class-arbitration waiv-

¹ Bilbrey asserts that Cingular’s arbitration provision allows only Cingular, and not its customers, to pursue claims in small claims court. That assertion, which Bilbrey made in his trial-court brief as well (*see* Bilbrey Arb. Resp., R. 256), is false: both the revised and superseded arbitration provisions explicitly authorize customers to sue in small claims court. *See* Cingular Renewed Arb. Mot., Ex. A, R. 214; Cingular Arb. Mot., R. 204. Bilbrey’s counsel similarly mischaracterized Cingular’s provision during the hearing before the district court, but corrected himself at that time. *See* 5/19/04 Tr. at 30-31.

ers (*see Rosen v. SCIL, LLC*, 799 N.E.2d 488 (Ill. App. Ct. 2003)), was wrongly decided. The appellate court's decision in *Kinkel* erroneously exalted the class-action procedural device over the state and federal policies favoring arbitration. In addition, the *Kinkel* court erred as a matter of law in analyzing the superseded version of Cingular's arbitration provision rather than the revised arbitration provision. Importantly, the Illinois Supreme Court granted review as to both of these issues. The case has been fully briefed and will be argued on May 16.²

Whitney v. Alltel Communications, Inc., 173 S.W.3d 300 (Mo. Ct. App. 2005), upon which Bilbrey also relies heavily, in fact undermines his position. In *Whitney*, the court specifically distinguished the Fifth Circuit's decision in *Iberia* on the ground that "the record established that the plaintiff's rights could be vindicated through arbitration under the contractual provisions and factual circumstances involved *in that case*." 173 S.W.3d at 313 & n.10 (citing *Iberia*, 379 F.3d at 174-75) (emphasis added). *Whitney* disapproved Alltel's arbitration provision not only because it had a class waiver, but also because it imposed "prohibitively expensive" costs of arbitration and deprived the arbitrator of the "power or authority" to award attorneys' fees and incidental, consequential, punitive, or exemplary damages. *Id.* at 314, 313, 304. These limitations are simply not present in Cingular's arbitration provision. Indeed, for these reasons, a Missouri trial court held that Cingular's arbitration provision was distinguishable from the Alltel provision at issue in *Whitney* and therefore com-

² Bilbrey also cites *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181 (S.D. Cal. 2005), in which the federal district court, applying California law, held that the class waiver in Cingular's arbitration provision is unconscionable. Cingular's appeal of that decision is pending. *See Laster v. Cingular Wireless LLC*, No. 06-55008 (9th Cir.). In the meantime, the district court has stayed further litigation, concluding that Cingular's arguments "present serious legal questions * * * for the appellate court to consider." *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), slip op. at 4 (S.D. Cal. Mar. 14, 2006).

elled individual arbitration of the plaintiff's claim. In so holding, the court noted that the appellate court in *Whitney* itself had specifically distinguished *Iberia. Blitz*, slip op. at 4-5.

Also inapposite is *Leonard v. Terminix Int'l Co.*, 854 So. 2d 529 (Ala. 2002), which held that a class-arbitration waiver in a contract for termite inspections was unenforceable. Since then, however, seven published federal district court decisions have enforced class-arbitration waivers under Alabama law and distinguished *Leonard* on the ground that the arbitration fees in *Leonard* were far greater than any potential recovery and that the arbitration provision in *Leonard* limited the types of damages that could be awarded and in particular precluded an award of attorneys' fees.³ These distinctions apply equally here, as under Cingular's arbitration provision, the customer pays nothing to arbitrate and has a broader entitlement to attorneys' fees than he would have in court.⁴

³ See *Pitchford v. AmSouth Bank*, 285 F. Supp. 2d 1286, 1296 (M.D. Ala. 2003) ("The costs of arbitrating the Leonards' claim (at least [\$1,100]) exceeded the dollar value of their claim (less than [\$500]), which effectively made arbitration an illusory forum for vindicating their substantive rights."); *Battels v. Sears Nat'l Bank*, 365 F. Supp. 2d 1205, 1217 (M.D. Ala. 2005); *Taylor v. First N. Am. Nat'l Bank*, 325 F. Supp. 2d 1304, 1319-22 (M.D. Ala. 2004); *Lawrence v. Household Bank (SB), N.A.*, 343 F. Supp. 2d 1101, 1112 (M.D. Ala. 2004); *Billups v. Bankfirst*, 294 F. Supp. 2d 1265, 1276-77 (M.D. Ala. 2003); *Gipson v. Cross Country Bank*, 294 F. Supp. 2d 1251, 1263-64 (M.D. Ala. 2003); *Taylor v. Citibank USA, N.A.*, 292 F. Supp. 2d 1333, 1345-46 (M.D. Ala. 2003).

⁴ The remainder of Bilbrey's cases are similarly distinguishable. See *Ting*, 319 F.3d at 1151 (customer was required to split arbitrator's fees); *ACORN v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1174 (N.D. Cal. 2002) (customer had to bear costs of arbitration that "would be approximately ten times the cost of bringing a similar action in State court"); *In re Knepp*, 229 B.R. 821, 838 (N.D. Ala. 1999) (arbitration provision required debtor "to pay initial fees for arbitration ranging from \$500.00 to \$7,000.00 and daily costs of hundreds of dollars when the court system will provide the same dispute resolution with the same degree of or even greater expertise for free" and precluded the award of attorneys' fees); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999) (arbitration provision precluded punitive damages and other statutorily mandated remedies); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1173-77 (Ohio Ct. App. 2004) (customer was required to pay "prohibitive costs" to arbitrate); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000) (arbitration provision "fail[ed] to confer on the arbitrator the authority to provide" injunctive and declaratory relief authorized by statute). *Lozada* is poor

Changing tacks, Bilbrey dismisses the dozens of cases holding that prohibiting class-wide arbitration is not unconscionable at least when the costs of arbitration are small and the arbitration provision does not limit the remedies available to prevailing plaintiffs by asserting that Cingular’s “present [arbitration] clause * * * exposes [him] to greater costs and limits the relief available.” Answer Br. 24 n.11. But that assertion is demonstrably false: as we explained in our Brief in Chief (at 6, 10-13), Cingular’s arbitration provision is cost-free and does not limit the arbitrator’s authority to award whatever remedies a court could award.⁵ Indeed, as a comparative matter, a consumer who pursues an individual arbitration against Cingular will invariably recover more money in arbitration than he or she could as a member of a class. That is because class actions routinely settle for much less than 100 cents on the dollar—often only pennies (or vouchers for goods or services worth pennies on the dollar)—and the class counsel’s fees often come out of the settlement. *See, e.g.*, Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 L. & CONTEMP. PROBS. 167, 168 (1997); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1051-89 (1996).

support for Bilbrey’s position for the additional reason that it relied heavily on *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264 (D. Del. 1999), which was reversed in relevant part by the U.S. Court of Appeals for the Third Circuit. *See Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000).

⁵ Bilbrey suggests that Cingular “retains an ‘out’ to not pay [the costs of arbitration]” because AAA arbitrators will be “inherently bias[ed] against the individual” in determining whether a claim is improper. Answer Br. 29 n.12. Such generic aspersions on the integrity of arbitrators have no place in the law of this State. As the Supreme Court has made clear, “[w]e are well past the time when * * * suspicion * * * of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985). Accordingly, the Supreme Court has “decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.” *Gilmer*, 500 U.S. at 30 (quoting *Mitsubishi Motors*, 473 U.S. at 634).

In the end, Bilbrey is forced to fall back on hyperbolic rhetoric, asserting (without a whit of record support) that “Cingular’s true purpose” for including a class-arbitration waiver in its arbitration provision was to “avoid accountability” and thereby place its “Oklahoma customers * * * at the tender mercies of this cellular telephone giant.” Answer Br. 25. This bald assertion ignores the fact that, by virtue of its commitment to pay the full cost of arbitration as well as a reasonable attorneys’ fee to prevailing customers, Cingular has created for itself a powerful economic incentive to resolve its customers’ colorable claims quickly and fairly. Because the amount that Cingular is responsible for paying in arbitration fees (\$1700) by itself will often (as here) vastly exceed the amount of the customer’s claim, Cingular has no economic incentive to try to use the class waiver to “avoid accountability.” See Br. in Chief 14.

Of course, the desire to avoid paying \$1700 to resist a claim that might be materially smaller than that amount is not the only or even the principal reason why Cingular has every incentive to remedy customers’ legitimate grievances rather than “avoid accountability.” Far more important is the constraint imposed by the exceptionally competitive market for wireless services. See FCC, *Tenth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services* (Sept. 30, 2005) ¶¶ 4, 41, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-173A1.pdf. If Cingular does not satisfactorily resolve its customers’ disputes, customers will switch to rival wireless service providers—the worst possible outcome for a consumer business.

In addition, as the Fifth Circuit has pointed out, if Cingular were to engage in a deliberate scheme to cheat its customers, state regulators and the state attorney general are fully empowered to take appropriate action. See *Iberia*, 379 F.3d at 175 (holding class

waiver not to be unconscionable in part because Louisiana attorney general could sue and could seek restitution on behalf of customers under consumer protection statute); *cf. Gilmer*, 500 U.S. at 32 (noting EEOC’s broad authority to protect consumers); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 233 (1987) (same with respect to SEC).

In sum, because Cingular’s arbitration provision allows customers to pursue their claims effectively through individual arbitration or small claims court, the mere fact that it requires arbitration to be conducted on an individual basis does not render it oppressively one-sided. The district court thus erred in holding that Cingular’s provision is unconscionable under Oklahoma law.

B. The FAA Preempts The District Court’s Ruling That Cingular’s Arbitration Provision Is Unenforceable.

Even if the district court’s ruling were correct under Oklahoma law—and it is not—we explained in our opening brief that the FAA would nevertheless preempt the court’s holding for two reasons. First, Section 2 of the Act (9 U.S.C. § 2) forbids courts from fashioning state-law rules unique to the arbitration context to deny enforcement of arbitration provisions. *See* Br. in Chief 17-19. Second, to condition the enforcement of an arbitration provision on the availability of class arbitration would eliminate all of the benefits of arbitration while retaining and multiplying its risks. That transformation would force companies doing business in this State to abandon arbitration, a result that could not be more inimical to the purposes of the FAA. *See id.* at 20-24.

Nevertheless, despite (or, perhaps, because of) the U.S. Supreme Court’s recent reminder that the FAA “embodies the national policy favoring arbitration” (*Buckeye Check Cashing, Inc. v. Cardegna*, 547 U.S. ___, ___, 126 S. Ct. 1204, 1207 (2006)), Bilbrey has not even *attempted* to respond to these arguments. His silence speaks volumes.

II. BILBREY’S ATTACKS ON FEATURES OF THE SUPERSEDED ARBITRATION PROVISION ARE MOOT AND, IN ANY EVENT, MERITLESS.

Bilbrey focuses the remainder of his fire on the original arbitration provision to which he agreed in May 2001.⁶ But as we explained in our opening brief, Cingular subsequently amended its arbitration provision to make arbitration cost-free and more convenient for its customers. The revised arbitration provision moots Bilbrey’s challenges to the earlier arbitration provision. Moreover, even if those challenges were not moot, they do not invalidate Bilbrey’s agreement to arbitrate.

A. Cingular’s Revised Arbitration Provision Applies To This Dispute.

In July 2003 Cingular mailed a revised arbitration provision to all of its customers—including Bilbrey—to make arbitration cost-free and more convenient for its customers. Br. in Chief 5-6. Yet Bilbrey asserts that the revised provision “is of no effect.” Answer Br. 14. That argument is misplaced. To begin with, the revised arbitration provision validly modified Bilbrey’s original arbitration provision under the provision of the Wireless Service Agreement authorizing Cingular to change any of the terms and conditions upon written notice. *See* Cingular Arb. Mot., R. 204. Bilbrey does not dispute that he, along with the rest of Cingular’s then-current customer base, was sent the revised provision. And even if the revised provision had not modified Bilbrey’s arbitration provision, but were instead treated as an offer to waive certain features of Bilbrey’s original arbitration provision—such as the requirement that he pay some of the costs of arbitration—courts around the country routinely

⁶ Bilbrey asserts that his original arbitration provision was contained in a Terms and Conditions document separate from the WSA that he signed. *See* Answer Br. 2 n.4. In fact, however, the Terms and Conditions were on the reverse side of the two-sided document comprising the WSA. *See* Cingular Arb. Mot., R. 203-04. Bilbrey signed the front side of that document under an acknowledgment that he had read and understood the Terms and Conditions. Moreover, Bilbrey does not deny that he is sufficiently sophisticated to have been able to understand what he was signing. *See* Br. in Chief 26-27 & 27 n.19.

have held that such an offer moots challenges to the waived provisions.⁷ That commonsense rule applies with all the more force here because Cingular sent the revised arbitration provision to all of its customers, not just Bilbrey.

The only authority upon which Bilbrey relies is a decision of the federal district court for the Virgin Islands refusing to enforce a mid-litigation offer to waive terms of an arbitration provision. *See Plaskett v. Bechtel Int'l*, 243 F. Supp. 2d 334 (D. V.I. 2003). *Plaskett* is distinguishable from this case because the defendant had not complied with a provision of the contract that required that “any amendment to the Agreement would be by written agreement of the parties.” *Id.* at 345. Here, by contrast, Cingular modified its arbitration provision in accordance with the agreement.

B. Bilbrey’s Arbitration Agreement Is Not Illusory.

Bilbrey argues that, because the WSA he signed with Cingular contains a “change-in-terms” provision, the arbitration agreement is “illusory” and unenforceable. Specifically, he claims that the mere *existence* of this change-in-terms provision renders the separate arbitration provision unconscionable because, under the superseded arbitration provision, “Cin-

⁷ *See, e.g., Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 56-57 (1st Cir. 2002) (“Conseco’s offer to pay the costs of arbitration and to hold the arbitration in the Larges’ home state of Rhode Island mooted the issue of arbitration costs”); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 & n.3 (5th Cir. 2004); *Anders v. Hometown Mortgage Servs., Inc.*, 346 F.3d 1024, 1026 (11th Cir. 2003); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003); *Dobbins v. Hawk’s Enters.*, 198 F.3d 715, 717 (8th Cir. 1999); *Zu-ver v. Airtouch Communications, Inc.*, 103 P.3d 753, 763 & n.7 (Wash. 2004) (“refus[ing] to ignore” defendant’s “offer[] to ‘defray the cost of arbitration’ by paying arbitration fees,” thus rendering “moot” the plaintiff’s argument that the fees were unconscionable); *Anderson v. Delta Funding Corp.*, 316 F. Supp. 2d 554, 567 (N.D. Ohio 2004); *Jung v. Ass’n of Am. Med. Colls.*, 300 F. Supp. 2d 119, 148-49 (D.D.C. 2004); *In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 411-12 (S.D.N.Y. 2003); *Nelson v. Insignia/ESG, Inc.*, 215 F. Supp. 2d 143, 157 (D.D.C. 2002); *First Family Fin. Servs., Inc. v. Sanford*, 203 F. Supp. 2d 662, 667 (N.D. Miss. 2002); *Baughner v. Dekko Heating Techs.*, 202 F. Supp. 2d 847, 850 (N.D. Ind. 2002); *Phillips v. Assocs. Home Equity Servs., Inc.*, 179 F. Supp. 2d 840, 847 (N.D. Ill. 2001); *Nur v. K.F.C., USA, Inc.*, 142 F. Supp. 2d 48, 52 (D.D.C. 2001).

gular *could* decide its arbitration procedures could change monthly or even weekly.” Answer Br. 17 (emphasis added). He is mistaken both factually and legally.

To begin with, Bilbrey does not and cannot contend that Cingular has on any occasion employed the change-in-terms provision to change the arbitration provision to his detriment. To the contrary, the only modification ever made to Bilbrey’s arbitration agreement was the July 2003 revision, which made arbitration cost-free and more convenient for Bilbrey and Cingular’s other customers. Moreover, that revised arbitration provision explicitly authorizes Bilbrey to reject any changes to it apart from the address at which customers must provide Cingular with notice of their intent to arbitrate. In language that could not be clearer, it states: “Notwithstanding any provision in this Agreement to the contrary, we agree that if Cingular makes any change to this arbitration provision (other than a change to the Arbitration Notice Address) during your Service Commitment, *you may reject any such change and require Cingular to adhere to the language in this provision.*” Cingular Renewed Arb. Mot., Ex. A, R. 215 (emphasis added). Hence, Bilbrey’s illusoriness argument is itself illusory: Cingular never has and never can use the change-in-terms provision to “change the rules at any time and make the changes retroactive to defeat existing rights” (Answer Br. 19).

Putting aside this fatal factual flaw in Bilbrey’s argument, the argument is legally untenable as well. The change-in-terms provision of Bilbrey’s WSA is *not* part of the arbitration provision; rather, it is a separate, general term that applies to the entirety of his contract. And it is well established that attacks on provisions other than the arbitration provision itself must be addressed to the arbitrator, not to a court. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967); *Rogers v. Dell Computer Corp.*, 2005 OK 51, 127

P.3d 560, 564 (citing *Prima Paint*). For example, in *Billups v. Bankfirst*, the plaintiff argued “that the entire Agreement, including the arbitration clause, is unenforceable because the Agreement’s amendment provision permits Bankfirst to alter the contract’s terms unilaterally.” 294 F. Supp. 2d at 1270. The court held that the plaintiff had to raise this challenge in arbitration, explaining that under *Prima Paint* “the Plaintiff’s argument regarding the illusory nature of the entire agreement” “does not place the making of the arbitration agreement in issue.” *Id.* at 1270-71 (emphasis added; internal quotation marks omitted). Bilbrey’s argument here is indistinguishable from the argument rejected in *Billups*.

Even if the Court were to reach the issue, however, Bilbrey’s argument is wrong as a matter of law. The FAA makes arbitration agreements enforceable unless they run afoul of a *previously existing* rule of contract law that would require “the revocation of *any* contract.” 9 U.S.C. § 2 (emphasis added). See *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (agreements to arbitrate may be invalidated on state-law grounds (such as illusoriness) only “if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally”) (emphasis in original). Thus, for “non-mutuality” to be a valid defense to arbitration under Section 2 of the FAA, there would have to be *extant* Oklahoma law requiring that each party to every contract be identically bound as to each and every provision of the contract. But—contrary to Bilbrey’s claim—Oklahoma law does not require every contract to be mutual at all, let alone that each independent provision of a contract be mutual. Rather, in Oklahoma “[m]ere lack of mutuality does not in and of itself render a contract invalid unless such lack of mutuality amounts to a lack of consideration for the contract.” *Ferrell Constr. Co. v. Russell Creek Coal Co.*, 1982 OK 24, 645 P.2d 1005, 1009; see also *Adalex Labs., Inc. v. Krawitz*, 1954 OK 140, 270 P.2d 346, 349-50 (“Lack of mutu-

ality means lack of consideration. * * * And where a consideration appears elsewhere in a contract the question of mutuality does not arise.”). In *Ferrell*, for example, this Court held that a strip-mining agreement was enforceable even though it was “terminable upon [one party’s] arriving at an opinion that coal can no longer be practically, economically, and profitably strip mined from the lease.” 645 P.2d at 1009.

The only Oklahoma case that Bilbrey cites, *Consolidated Pipe Line Co. v. British American Oil Co.*, 1933 OK 221, 21 P.2d 762, does not support his cause. In *Consolidated Pipe*, this Court *rejected* the argument that the contract at issue was unenforceable for want of mutuality (*see id.* at 767), explaining that a “lack of mutuality [must] constitute[] a failure of consideration” to render a contract unenforceable. *Id.* at 766.

This generally applicable principle that mutuality is not required for each and every term in a contract, so long as the contract as a whole is supported by consideration, requires this Court to reject Bilbrey’s illusoriness argument. As courts throughout the country have held, an arbitration provision contained in a consumer contract “need not be supported by equivalent obligations” in order to be enforceable. *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999) (collecting state and federal cases); *see also, e.g., Oblix, Inc. v. Winiecki*, 374 F.3d 488, 491 (7th Cir. 2004) (“That Oblix did not promise to arbitrate all of its potential claims is neither here nor there. Winiecki does not deny that the arbitration clause is supported by consideration—her salary. Oblix paid her to do a number of things; one of the things it paid her to do was agree to non-judicial dispute resolution.”); *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386 (6th Cir. 2003); *Torrance v. Aames Funding Corp.*, 242 F. Supp. 2d 862 (D. Or. 2002); *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F. Supp. 2d 655, 658 (S.D. Miss. 2000); *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 342

(Ky. App. 2001); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1255 (Colo. App. 2001). There can be no serious question that Cingular has made real, not illusory, promises to Bilbrey, and thus has provided consideration in exchange for his agreement to arbitrate this dispute. For example, Cingular is obligated under the contract to provide Bilbrey with cellular service, and has consistently done so. It also provided him with a new phone for free (*see* Supp. Cingular Reply, Ex. 4, Lopez Aff. ¶ 7, R. 430), which was no doubt the principal reason he signed the May 2001 Agreement rather than continuing on as a month-to-month customer.

Indeed, several courts that have presumed that term-by-term mutuality is required under the governing state law have nonetheless rejected arguments that the mere existence of a change-in-terms provision renders an arbitration provision unenforceably illusory. Most significantly, the Fifth Circuit rejected an illusoriness attack on Cingular's original arbitration provision, explaining:

The change-in-terms provisions in the contracts before us do not render the contracts' obligations illusory. * * * The fact that the company has the right to change the terms upon notice does not mean that the contract never bound it. Nor does the fact that the companies *could* later attempt to change the arbitration clause to render it oppressive mean that the arbitration clause, *as it stands*, is unconscionable.

Iberia, 379 F.3d at 173-74 (emphasis added).⁸ Similarly, in *Pierce v. Kellogg, Brown &*

⁸ Bilbrey asserts that *Iberia* was wrongly decided because, contrary to the Fifth Circuit's belief, "Cingular imposes no * * * limitation on its right to make changes." Answer Br. 19. As discussed above (at page 12), however, it is Bilbrey who is mistaken: under the revised provision, the customer is permitted to reject any material change (and the only changes made under the superseded provision were for the benefit of Cingular's customers). Bilbrey also suggests that *Iberia* is distinguishable because "it was based upon [the Fifth Circuit's] prediction of how Louisiana civil law might be interpreted." *Id.* at 19 n.8. But the court made clear that "[t]he Louisiana civil-law tradition recognizes some of the same basic principles that lie behind the common-law doctrine, albeit by employing different terminology." 379 F.3d at 172 n.15. Bilbrey has pointed to no relevant distinction between Louisi-

Root, Inc., 245 F. Supp. 2d 1212, 1214 (E.D. Okla. 2003), the court explained that, because under the change-in-terms provision at issue in that case any change could be applied prospectively only, that provision did not render the agreement illusory. For similar reasons, the *en banc* Sixth Circuit upheld an arbitration agreement that one party could alter only with advance notice. *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 668 (6th Cir. 2003). Like those agreements, the change-in-terms provision in Bilbrey’s May 2001 contract allowed only prospective changes and required notice before any change could be implemented. See Cingular Arb. Mot., R. 204. (And, of course, the revised provision allows customers to reject any material change to it.) Thus, there is nothing “illusory” about the agreement between Bilbrey and Cingular just because—like millions of other contracts—it includes a change-in-terms provision.

Bilbrey places heavy reliance on *Dumais v. American Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002). But *Dumais* and the other cases he cites suffer from the same flaw: they fail to recognize that any attack on a change-in-terms provision applies to the contract as a whole rather than to the arbitration provision alone, and therefore is for an arbitrator rather than a court to decide. It was for this reason that the federal district court for the Middle District of Alabama rejected a challenge to an arbitration provision in a credit-card agreement based on the change-in-terms provision, stating: “This court is not persuaded by *Dumais* * * * because it does not address the *Prima Paint* rule, that is, it did not consider whether the change-in-terms clause would render the rest of the contract unenforceable as well. More to the point, [*Dumais*] did not explain how the [illusoriness] argument might constitute an exception to the *Prima Paint* rule.” *Taylor v. First N. Am. Nat’l Bank*, 325 F.

ana civil law and Oklahoma’s common law that undermines the persuasive force of *Iberia* here.

Supp. 2d at 1315.

In any event, *Dumais* is distinguishable in two material respects. First, under the July 2003 arbitration provision Cingular's customers can reject any change to that arbitration provision; thus Cingular cannot modify it without Bilbrey's consent. *See* page 12, *supra*. Second, unlike in *Dumais*, even under the original contract Cingular could not modify the arbitration provision without giving its customers advance notice. The federal court for the Eastern District of Oklahoma found such a notice requirement significant in distinguishing *Dumais*. *See Pierce*, 245 F. Supp. 2d at 1215 (holding that *Dumais* did not apply to an arbitration agreement that the employer could modify only prospectively and upon 10 days notice).

C. The Costs Of Arbitration Under The May 2001 Provision Would Not Be Prohibitive For Bilbrey.

Bilbrey claims that the arbitration fees he would have to pay to pursue his claims under the May 2001 arbitration provision "make[] pursuing such claims untenable." Answer Br. 29. Of course, Bilbrey need not pay any fees to arbitrate under his current arbitration provision, so this argument is moot.

But even if he insisted on paying his share of arbitration fees under the superseded provision, such fees would not render the arbitration agreement unenforceable. The U.S. Supreme Court has rejected the view that imposing *any* costs of arbitration on an individual consumer is inherently unconscionable. *See Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 91-92 (2000). As the Court explained, when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.* at 92.

In attempting to meet his burden, Bilbrey misstates the cost-allocation rules that

would apply to an arbitration under the superseded arbitration provision: his assertion that “[t]hese fees can be in the thousands of dollars” (Answer Br. 29) is false—at least if the implication is that *he* would be forced to pay them. In fact, the relevant AAA rules make explicit that, for claims less than \$10,000, a consumer’s share of costs is capped at \$125.⁹ That cost is less than the \$147 filing fee for a civil action of \$10,000 or less. *See* 28 O.S. § 152. Indeed, Justice Ginsburg has cited the AAA’s consumer fee schedule with approval. *See Randolph*, 531 U.S. at 95 (Ginsburg, J., concurring in part and dissenting in part)).

D. Bilbrey’s Challenge To The Confidentiality Requirement In The May 2001 Arbitration Provision Is Moot And, In Any Event, Lacks Merit.

Bilbrey’s challenge to the confidentiality requirement in Cingular’s superseded arbitration provision also is moot because the revised arbitration provision eliminates that requirement. Even if the requirement still applied, however, it is in no way unconscionable.

Bilbrey argues that confidentiality “precludes customers from obtaining precedent to use in their claims.” Answer Br. 28. That argument has no basis in fact or law. As the Fifth Circuit has stressed—in holding that this very same confidentiality provision was not unconscionable under Louisiana law—an attack on a confidentiality provision in an arbitration clause is “an attack on the character of arbitration itself.” *Iberia*, 379 F.3d at 175. That is because, “[i]f every arbitration were required to produce a publicly available, ‘precedential’

⁹ Under the May 2001 provision, the AAA’s Wireless Industry Association (“WIA”) rules apply. Those rules provide that “[t]o make arbitration costs reasonable for consumers, the AAA has a separate fee schedule for consumer-related disputes. Please refer to Section C-8 of the *Supplementary Procedures for Consumer-Related Disputes* when filing a consumer-related claim.” AAA, WIA Rules, Administrative Fees, available at <http://www.adr.org/sp.asp?id=22010>. That section of the consumer rules limits a consumer’s costs to \$125. *See* AAA, *Supplementary Procedures for the Resolution of Consumer-Related Disputes*, Section C-8, available at <http://www.adr.org/sp.asp?id=22014>. *See also O’Quin v. Verizon Wireless*, 256 F. Supp. 2d 512, 514 & n.1 (M.D. La. 2003) (explaining that *Supplementary Procedures* are applicable to consumers).

decision on par with a judicial decision, one would expect that parties contemplating arbitration would demand discovery * * *, adherence to formal rules of evidence, more extensive appellate review, and so forth—in short, all of the procedural accoutrements that accompany a judicial proceeding.” *Id.* at 175-76. That, of course, would undermine the purpose of arbitration in the first place: “[P]art of the point of arbitration is that one ‘trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’” *Id.* at 176 (quoting *Mitsubishi Motors*, 473 U.S. at 628). Consumers would bear the ultimate burden of these expanded procedures through higher prices. *See Carnival Cruise Lines v. Shute*, 499 U.S. 585, 594 (1991) (explaining that limiting circumstances in which cruise line may be sued leads to reduced fares for passengers). Thus, any state-law rule that a confidentiality requirement in an arbitration provision is unconscionable would “stand[] as an obstacle to the accomplishment and execution of the full purposes and objective of Congress” in enacting the FAA and therefore would be preempted under the Supremacy Clause of Article VI of the U.S. Constitution. *United States v. Locke*, 529 U.S. 89, 109 (2000) (internal quotation marks and citation omitted); *accord Iberia*, 379 F.3d at 167.

Bilbrey relies on *Ting*’s conclusions about the impropriety of confidentiality provisions. *See Answer Br.* 28. But that court’s determination is infected by bias against arbitration generally. As one commentator recently explained, “[t]he fact that [some] judges find confidentiality requirements to be harsh, oppressive, and ultimately unenforceable in the context of arbitration agreements [even though they are] perfectly acceptable in the context of settlement agreements * * * suggests a bias against arbitration.” Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 *BUFF. L. REV.* 185, 220 (2004); *cf. Iberia*, 379 F.3d at 176 (“it is instructive that Louisiana law does not

prohibit” confidential settlements).

Moreover, even if it might be unconscionable to include a confidentiality requirement in a contract that limits customers to the arbitral forum, Cingular’s contracts allow customers who desire a public hearing to obtain that hearing by proceeding in small claims court. *See* Cingular Arb. Mot., R. 204. The record of those public proceedings also provides access to information from prior cases to consumers who proceed in arbitration.

Accordingly, Bilbrey’s argument that the confidentiality provision renders Cingular’s superseded arbitration provision unconscionable lacks merit.

E. The Limitation On Punitive Damages And Other Remedies (Which Has Been Superseded By the Revised Arbitration Provision) Does Not Render The Arbitration Agreement Unconscionable.

Bilbrey’s argument that the limitation on punitive damages and other remedies in the May 2001 arbitration provision renders that provision unenforceable (*see* Answer Br. 26-28) is likewise mistaken. For starters, although that provision did preclude arbitrators from awarding punitive damages or certain other relief under some circumstances (*see* Cingular Arb. Mot., R. 204), the July 2003 arbitration provision that superseded it does not contain a similar prohibition. Thus, if Bilbrey were to demonstrate that, for example, punitive damages were warranted, the arbitrator would be entitled to include such damages in its award.

Moreover, Bilbrey does not appear to have standing to challenge the limitation on remedies for the simple reason that his petition specifies only a request for “actual damages” (Petition, R. 5), not punitive damages or any other relief. Even if Bilbrey did have standing, there is nothing problematic about the limitation in the May 2001 arbitration provision. Bilbrey’s characterization of the limitation leaves out a key aspect: that it applies “[e]xcept where prohibited by law” (Cingular Arb. Mot., R. 204 (emphasis added)); that is, any limits on punitive damages or other relief apply only to the extent permitted by law. Accordingly,

if that provision were still in effect, Bilbrey would be free to argue *to the arbitrator* that Oklahoma law prohibits contractual waivers of punitive damages (or any other remedy he seeks) for claims like his. See *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 406-07 (2003). As the U.S. Supreme Court has observed, when it is unclear “how the arbitrator will construe the remedial limitations” as they apply to a particular case, “*the proper course is to compel arbitration.*” *Id.* at 407 (emphasis added).

In any event, the United States Supreme Court has strongly implied that an agreement to waive punitive damages in arbitration is valid and enforceable. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the Court noted with approval respondent’s argument that, under the FAA and the reasoning of *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), “the parties to a contract may lawfully agree to limit the issues to be arbitrated by waiving any claim for punitive damages.” 514 U.S. at 58. Consistent with that statement, the vast majority of courts to examine the question have held that arbitration agreements that preclude punitive damages are acceptable. For example, in a case arising out of Oklahoma, the U.S. Court of Appeals for the Tenth Circuit recognized that parties may “withdraw[] th[e] power” “to award punitive damages,” even though the parties before it had not done so. *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 940 (10th Cir. 2001) (quotations omitted). The Seventh Circuit has likewise explained that “parties can stipulate to whatever procedures they want to govern the arbitration of their disputes * * * and surely can stipulate that punitive damages will not be awarded.” *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994). See also, e.g., *Inv. Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 318 n.1 (5th Cir. 2002); *Long v. Silver*, 248 F.3d 309, 319 (4th Cir. 2001); *Davis v.*

Prudential Secs., Inc., 59 F.3d 1186, 1189 (11th Cir. 1995); *Raytheon Co. v. Automated Bus. Sys., Inc.*, 882 F.2d 6, 12 (1st Cir. 1989); *Surman v. Merrill, Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 63 (8th Cir. 1984).

III. BILBREY'S REMAINING ARGUMENTS AGAINST ENFORCEMENT OF HIS ARBITRATION AGREEMENT ARE ALL WITHOUT MERIT.

A. Cingular Did Not Waive Its Right To Compel Arbitration.

Bilbrey urges this Court to hold that Cingular has waived its contractual right to require arbitration of his dispute. In making that alternative argument for affirmance, however, Bilbrey disregards the strong state and federal policy in favor of arbitration, and asks the Court to reach a result at odds with the weight of the case law.¹⁰

As we explained in our opening brief (at 29-30), under both Oklahoma and federal law, waiver of arbitration rights is “not to be lightly inferred.” *Urus Indus. Corp. v. Ventura Foods, L.L.C.*, No. 05-CV-0516-CVE-PJC, 2006 WL 964743, at *2 (N.D. Okla. April 10, 2006); accord, e.g., *Northland Ins. Co. v. Kellogg*, 1995 OK CIV APP 84, 897 P.2d 1161. Accordingly, “[p]arties seeking to prove waiver of arbitration obligations bear a **heavy burden**; they must show substantial prejudice.” *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 701 (10th Cir. 1989) (emphasis added); see also, e.g., *Peterson v. Shearson/Am. Express, Inc.*, 849 F.2d 464, 466 (10th Cir. 1988); *Baker v. Conoco Pipeline Co.*, 280 F. Supp. 2d 1285, 1298 (N.D. Okla. 2003).

Bilbrey has failed to carry this heavy burden in two respects. **First**, he has not shown that Cingular intended to waive its right to compel arbitration. As the Minnesota Su-

¹⁰ In spite of what Bilbrey seems to suggest (see Answer Br. 6, 14), the district court made no findings related to waiver. To the contrary, in announcing its decision, the district court made clear that its ruling rested on its view that the class-arbitration waiver is unconscionable. See 11/29/04 Tr. at 5-6. Indeed, the district court declined to adopt a proposed order submitted by Bilbrey that would have included a finding of waiver. Compare Bilbrey Proposed Order, R. 498, with Order Denying Arbitration, R. 535.

preme Court recently explained, “[t]he party alleging waiver [of arbitration] must provide evidence that the party that is alleged to have waived the right possessed both knowledge of the right in question and the intent to waive that right.” *Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 798 (Minn. 2004). Likewise, the Texas Supreme Court has held that “[w]aiver of an arbitration right must be intentional. Implying waiver from a party’s actions is appropriate only if the facts demonstrate that the party seeking to enforce arbitration intended to waive its arbitration right.” *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 87 (Tex. 1996). Two other state supreme courts and the U.S. Court of Appeals for the Fifth Circuit, among other courts, agree. *See, e.g., Baker v. Stevens*, 114 P.3d 580, 583 (Utah 2005); *Charles J. Frank, Inc. v. Assoc. Jewish Charities, Inc.*, 450 A.2d 1304, 1306-07 (Md. 1982); *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 Fed. Appx. 462, 465 (5th Cir. 2004); *cf. Booker v. Sumner*, 2001 OK CIV APP 22, 19 P.3d 904, 907 (finding waiver based on defendant’s “knowing acquiescence in continuation of the litigation”).

It is undisputed here that the only reason that Cingular did not move to compel arbitration immediately after Bilbrey signed the arbitration agreement was that its legal department was unaware of the agreement. Under these circumstances, Cingular cannot be said to have knowingly and intentionally waived its right to arbitrate.

Courts addressing similar situations have repeatedly held that delay resulting from the defendant’s belated discovery of an arbitration agreement cannot form the basis for a valid waiver. The Fifth Circuit, for example, has held that arbitration was not waived when the defendant “was simply unaware of the 1999 agreement until it was produced in discovery, and promptly moved to compel arbitration once it became aware of the arbitration clause.” *Tristar*, 97 Fed. Appx. at 465. The court reasoned:

Waiver is ordinarily the knowing and voluntary relinquishment of a known right. * * * Such a knowing waiver did not occur here. * * * [T]he invocation of the judicial process that effects a waiver requires the waiving party to demonstrate a *desire* to resolve the arbitrable dispute through litigation *rather* than arbitration. * * * ***Litigating a dispute in ignorance of the right to arbitrate does not demonstrate such a desire.***

Id. (third emphasis added) (citing *Texaco Exploration & Prod. Co. v. AmClyde Engineered Prods. Co.*, 243 F.3d 906, 912 (5th Cir. 2001) and *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999)).

Similarly, in *Williams v. Cigna Financial Advisors, Inc.*, 56 F.3d 656 (5th Cir. 1995), plaintiff Williams filed a lawsuit against Cigna in state court, after which Cigna removed the case to federal court, filed a motion to dismiss (which was denied), answered the complaint, asserted a counterclaim, and participated in discovery. Nine and a half months after the complaint had been filed, “Cigna discovered that Williams had signed a written agreement requiring arbitration of his claim and moved for a stay of proceedings pending arbitration.” *Id.* at 658. The district court denied Cigna’s motion, and the Fifth Circuit reversed, observing that “Cigna filed its motion for a stay pending arbitration as soon as it discovered that the dispute was subject to arbitration.” *Id.* at 661. *See also, e.g., Vitzethum v. Dominick & Dominick Inc.*, Nos. 94 Civ. 4938, 95 Civ. 429, 1996 WL 19062, at *10 (S.D.N.Y. Jan. 18, 1996) (no waiver where defendant had only recently discovered arbitration agreement); *Berk v. Oppenheimer & Co.*, No. 82 C 4928, 1985 WL 625, at *1 (N.D. Ill. Apr. 12, 1985) (no waiver where defendants moved to compel arbitration 30 months after complaint was filed, because “it was only recently that they discovered the agreement to arbitrate”).

Cingular likewise invoked the arbitration clause as soon as it became aware of it (*see* Cingular Arb. Mot., R. 193-204), and thus cannot be said to have knowingly relinquished its right to arbitrate. Simply put, “a party cannot waive a right it does not know it has.”

Vitzethum, 1996 WL 19062, at *10. Accordingly, Bilbrey has failed to carry his “heavy burden” of demonstrating that Cingular knowingly and intentionally waived its right to arbitrate this dispute.¹¹

Second, Bilbrey has failed to carry his burden for the independent reason that he has not shown “substantial prejudice” to his case as a result of Cingular’s delay in moving to compel arbitration. *See, e.g., Adams*, 888 F.2d at 701 (party asserting waiver “must show substantial prejudice”). For a party to waive its right to arbitrate, it must have “substantially invoked” the “litigation machinery” in a manner that causes “actual prejudice to a plaintiff as a result of a defendant’s delay in asserting the right to arbitrate.” *Baker v. Conoco Pipeline*, 280 F. Supp. 2d at 1299, 1301, 1302 (quoting *Towe, Hester & Erwin, Inc. v. Kansas City Fire & Marine Ins. Co.*, 1997 OK CIV APP 58, 947 P.2d 594, 599) (internal quotation marks omitted). Thus, without a showing of actual prejudice, “even where a party takes substantial steps toward litigation of the arbitral dispute, or participates substantially in litigation procedures, it ordinarily will not waive the right to arbitrate.” *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 484 (5th Cir. 2002).

Bilbrey cannot identify any actual prejudice, claiming only generically that he has suffered “delay and expense.” Answer Br. 13. Simply alleging an expenditure of time and money on the litigation is insufficient, however. *See Baker v. Conoco Pipeline*, 280 F. Supp. 2d at 1300 (“[t]he mere passage of time cannot be relied upon as a waiver of the right to arbitrate”). The party asserting waiver must also “specifically articulate” some “substan-

¹¹ Bilbrey half-heartedly suggests that Cingular waived its right to compel arbitration when it stipulated to defend this lawsuit in its own name (*see* Answer Br. 8) rather than continuing to challenge whether it was a proper party defendant. That argument is frivolous. Cingular had filed its motion to compel arbitration five days before it filed the stipulation (as Bilbrey acknowledges (*see id.*)), yet nothing in the stipulation expressly or impliedly withdrew that motion.

tial prejudice [he has] incurred * * * that would not be of benefit in arbitration.” *Id.* at 1302. But Bilbrey has failed to show *any* prejudice—much less “substantial prejudice”—here.

Cingular has not *invoked* the litigation machinery at all: it has simply fulfilled its obligations to respond to Bilbrey’s Petition and discovery requests. The motion for summary judgment that Cingular filed—on which Bilbrey places so much reliance (*see* Answer Br. 11)—did not seek resolution of the case on its merits, but rather contended that Cingular was an improper party to the litigation. Moreover, Cingular withdrew that motion before the district court considered it. When Cingular’s litigation department discovered that Bilbrey had agreed to arbitrate, this litigation had not advanced beyond its preliminary phases. In cases such as this one, in which a party has moved to compel arbitration before the merits of the case have even been broached, courts have overwhelmingly found that arbitration has not been waived. *See, e.g., Urus*, 2006 WL 964743, at *3 (holding that removing case to federal court, answering complaint, and participating in discovery did not sufficiently invoke the “litigation machinery” to waive arbitration, since filing motion to compel “approximately six months before trial gave [plaintiff] sufficient time to respond and did not, therefore, affect, mislead, or prejudice [him]”); *Adams*, 888 F.2d at 701-02 (no substantial prejudice when defendant delayed seeking arbitration for nearly a year, during which time it had filed a counterclaim, engaged in discovery, and filed motions); *Baker v. Conoco Pipeline*, 280 F. Supp. at 1299-1302 (no waiver when defendant sought and responded to discovery, prepared joint status report, and participated in other preliminary aspects of litigation); *Cason v. Conoco Pipeline Co.*, 280 F. Supp. 2d 1309, 1320-24 (N.D. Okla. 2003) (same).

The cases on which Bilbrey primarily relies for his argument that Cingular has waived its right to arbitrate are all readily distinguishable from this case in critical respects.

For example, Bilbrey cites *Northland Insurance*, which is wholly inapposite because it was the *plaintiff* in that case who, after initiating the litigation, belatedly sought arbitration. The court held that, after filing a petition that “specifically requests a jury trial” and “pursu[ing] judgment on the alleged merits by motion for summary judgment,” plaintiff could not reverse course and opt to arbitrate instead. 897 P.2d at 1162-63. The court emphasized: “Plaintiff significantly participated in the litigation. Indeed, Plaintiff *initiated* the litigation.” *Id.* at 1162 (emphasis in original). Here, Cingular neither initiated the litigation nor sought to advance it to judgment on the merits. Accordingly, the *Northland* decision has no bearing on this case. Likewise, in *Uwaydah v. Van Wert County Hospital*, 246 F. Supp. 2d 808 (N.D. Ohio 2002), the court found that the plaintiff had waived his right to arbitrate by “instituting and actively participating in this litigation” for eighteen months, and then moving to compel arbitration when the case was “on the brink of resolution either by dispositive motion or trial.” *Id.* at 810-11. Here, by contrast, Cingular did not institute this litigation; the case is nowhere near “the brink of resolution,” and—apart from discovery skirmishes—Cingular had not suffered a single adverse ruling when it moved to compel arbitration.

Bilbrey also relies on *Booker v. Sumner*, but that too differs materially from this case. In *Booker*, the court based its finding of waiver on the fact that the defendant was aware of the arbitration provision and *knowingly* acquiesced in a year and a half of litigation, invoking his right to arbitrate only after “the case had been presented for final disposition by [the plaintiff’s] motion for summary judgment.” 19 P.3d at 907. Indeed, the defendant *explicitly acknowledged* during a deposition that his contract with the plaintiff contained an arbitration clause, but nevertheless made no demand for arbitration until months later. Here, because Cingular was initially unaware of Bilbrey’s arbitration agreement, it

cannot be said to have waived its arbitration right by knowingly acquiescing in litigation.

The other three cases Bilbrey cites are also fully distinguishable: they involve other factors not present here, such as much longer delays in asserting the right to arbitrate, the offensive use of discovery by the party seeking arbitration, the filing of counterclaims, or litigation of issues going directly to the merits of arbitrable claims. *See Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 773-76 (D.C. Cir. 1987); *Southern Sys., Inc. v. Torrid Oven Ltd.*, 105 F. Supp. 2d 848, 856 (W.D. Tenn. 2000); *Law Offices of Dixon R. Howell v. Valley*, 29 Cal. Rptr. 3d 499 (Cal. Ct. App. 2005).

B. This Dispute Is Within The Scope Of Bilbrey's Agreement To Arbitrate.

Bilbrey's suggestion that his arbitration agreement should not be enforced because he entered into it after initiating litigation against Cingular (Answer Br. 6-7) is wholly at odds with volumes of case law holding that post-dispute arbitration agreements are enforceable, not to mention the strong federal and Oklahoma policy favoring broad application of arbitration provisions.

Bilbrey makes no effort to refute the long line of cases Cingular cited affirming that courts routinely compel arbitration of claims arising before the parties entered into their arbitration agreement. *See* Br. in Chief 25-27 & nn.16-17. Instead, Bilbrey relies on cleverly excerpted language from several early-20th-century cases having nothing to do with arbitration. Quoting a line from the *syllabus* of this Court's opinion in *Gibson Oil Co. v. Kelley*, 1934 OK 533, 36 P.2d 1111—stripped of any context—Bilbrey asserts: “It is well settled that ‘[t]he rights of the parties are to be determined as they existed when suit was commenced.’” Answer Br. 7 (alteration in original). Even a cursory review of this case and of *American Inv. Co. v. Baker*, 1926 OK 857, 250 P. 76, the other case on which Bilbrey chiefly relies, reveals that both cases stand for the wholly immaterial proposition that,

“unless [a] *plaintiff* has a valid and subsisting cause of action at the time his action is commenced, the defect cannot be remedied by the acquisition or accrual of one while the action is pending.” *Baker*, 250 P. at 77 (emphasis added); *see also Gibson Oil*, 36 P.2d at 1116-17. As Bilbrey acknowledges, the other two cases he cites stand for the same proposition. *See Answer Br. 7* (citing *White v. Tulsa Iron & Metal Corp.*, 1939 OK 465, 96 P.2d 590; *Town of New Wilson v. Davis*, 1938 OK 516, 83 P.2d 399). The rule that a plaintiff cannot sue before a cause of action arises in no way affects the enforceability of Bilbrey’s agreement to arbitrate disputes with Cingular.

As we explained in our opening brief (at 3-4), Bilbrey signed a contract in May 2001 requiring him to arbitrate “any and all disputes and claims” arising out of his wireless service agreement with Cingular, *or* out of “*any prior Agreement* for products or services” between him and Cingular or any Cingular affiliate or predecessor in interest. Cingular Arb. Mot., R. 204. The language of this broadly worded provision plainly encompasses Bilbrey’s pre-existing claim arising out of his prior service agreement with Cingular’s predecessor.

But even if any ambiguity did exist, federal and state law requires that it be resolved in favor of arbitration. As courts in this state have repeatedly observed, “[u]nder the Federal Arbitration Act and the Uniform Arbitration Act adopted by Oklahoma * * * there is a strong presumption in favor of provisions for arbitration.” *Northland Ins. Co.*, 897 P.2d at 1162. Indeed, the U.S. Supreme Court has “stated that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Fleming Cos. v. Tru Discount Foods*, 1999 OK CIV APP 18, 977 P.2d 367, 370-71 (citing *Moses H. Cone*, 460 U.S. at 24-25). This strongly pro-arbitration policy “requires [courts] to construe arbitration clauses as broadly as possible. Thus, arbitration should be compelled unless it may be said with posi-

tive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Fleming*, 977 P.2d at 371 (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)); *accord*, e.g., *Urus*, 2006 WL 964743, at *2 (“Arbitration clauses are to be construed broadly and all doubts must be resolved in favor of coverage.”); *Towe, Hester & Erwin*, 947 P.2d at 596.

It can hardly be said “with positive assurance” that an arbitration agreement whose plain language covers “any and all disputes and claims” arising out of “any prior Agreement” for wireless service with any Cingular predecessor-in-interest “is not susceptible of an interpretation that covers the asserted dispute.” Bilbrey’s claim arising out of his agreement with Cingular’s predecessor falls squarely within the scope of this provision, and thus both state and federal law require that Bilbrey be held to his agreement to arbitrate.

CONCLUSION

The Court should reverse the district court’s order denying the motion to compel arbitration.

Respectfully submitted.

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CERTIFICATE OF SERVICE

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